

Personal  
Freedoms  
under Ongoing  
Transition  
from Totalitarianism  
to Democracy:  
The Case  
of Bulgarian  
Judiciary



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The post-communist societies had their own legal, economic, and defense ideologies. The Council for Mutual Economic Assistance (COMECON)<sup>1</sup> was directed by economic ideology, while the Warsaw Pact<sup>2</sup> was led by military ideology. They both served as a counterbalance to the Western culture's formations the European Coal and Steel Community (ECSC) and the European Economic Community (EEC) within Europe, and the North Atlantic Treaty Organization (NATO) – also within Europe but including the overseas counterpart.

Socialist doctrine sets state's welfare as the foundation of its ideology and puts, accordingly, public good over the personal one. The realization of this doctrine is secured through the means of economy and war. In the legal doctrine, the comprehensive notion of public good cannot be applied as the citizens and their rights remain unrecognizable, which demotivates people to contribute to the public good of socialism. The change of the legal order after abandoning socialism in Eastern European countries belonging to the Soviet bloc had a particular goal: to elevate the *individual* over the state formation, *videlicet*, the Constitution shall be an index of the rights and freedoms of the individual, and a guide on limiting the

<sup>1</sup> Council for Mutual Economic Assistance (CMEA), also called Organization for International Economic Cooperation (from 1991), was an organization established in January 1949 to facilitate and coordinate the economic development of the Eastern European countries belonging to the Soviet bloc.

<sup>2</sup> Warsaw Pact, formally Warsaw Treaty of Friendship, Cooperation, and Mutual Assistance, (May 14, 1955–July 1, 1991), was a treaty establishing a mutual-defense organization (Warsaw Treaty Organization) composed originally of the Soviet Union, Albania, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, and Romania. The treaty (which was renewed on April 26, 1985) provided a unified military command and for the maintenance of Soviet military units on the territories of the other participating states.

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THE LEGAL ORDER, AND LAW ENFORCEMENT IN PARTICULAR, DEFINE THE EXTENT TO WHICH RIGHTS AND FREEDOMS OF THE INDIVIDUAL MAY AND WILL DEVELOP

so-called “state” entity. The laws, in turn, should serve as guidelines towards the usage of civic rights and freedoms. The main warrant protecting the rights of a citizen, who is liberated from totalitarian views, is **the legal order** as regulator of fundamental rights and freedoms, and justice as defender and guarantor to respect the rights of this citizen. The legal order, and law enforcement in particular, define the extent to which rights and freedoms of the individual may and will develop.

### TRANSITION PROCESSES OF FORMER SOCIALIST STATES

Economy, defense, and legal order continue to be the connecting thread of the ex-communist camp's countries. Similar is the transition of these countries across the three key areas. As regards the economy – from predominantly state-owned property to privatization and protection of private property. In defense – from conscript army and allies facing the ideo-



THE GOVERNING PRACTICES IN FORMER COMMUNIST COUNTRIES SYMBOLIZE THE INCOMPLETENESS OF THE PROCESS IN ITS OTHERWISE FORMALIZED EXECUTION. THIS IS WHY THESE GOVERNMENTS SUFFER FROM POPULISM AND THE MORE SERIOUS INFECTIONS SUCH AS AUTHORITARIANISM AND NATIONALISM

logical enemy, to professional army and partners led by the concept of protection against attack on the individual and on the democratic order. Law's mission

was to liquidate the Soviet-type constitutions and adopt Europe's inherent constitutions of the 1980s (those changing the image of the state).<sup>3</sup> Given that the conceptual direction is clear, the timeline can be defined. It starts with the opposition of the pro-Soviet regimes, the rejection of those regimes, the free elections, and the binding of those who exercise the new power with the family of the old democracies. A tool of involvement is the membership in various "democracy clubs" – Council of Europe, negotiations prior joining European Union and NATO; and for those that successfully passed the process – full membership in these organizations.

However, the democratization could only be declared "accomplished" in the presence of working legislative, executive, and judicial institutions. Such institutions do not allow or make it the most difficult to master the transformation and redirect it to serve non-democratic government and the power to harm individual rights and freedoms.

The governing practices in former communist countries symbolize the incompleteness of the process in its otherwise formalized execution. This is why these governments suffer from populism and the more serious infections such as authoritarianism and nationalism. The manifestation of the weaknesses in Hungary and Poland, which has been expressed in the liquidation of the judicial independence, is slowly approaching the Balkans. The process of overpowering the judiciary by the executive in Romania did not start until the spring of 2017.

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<sup>3</sup> A constitutional generation adopted with the eradication of authoritarian regimes in Portugal and Spain and continued with the liquidation of the Soviet model state in the Eastern Bloc.



THE POST-TOTALITARIAN LEGAL ORDER IS HIGHLY AMBIGUOUS – IT CONSTANTLY MIXES THE SHORTCOMINGS OF SOCIALISM WITH DEMOCRATIC ACHIEVEMENTS

### BULGARIA'S TRANSITION

In Bulgaria<sup>4</sup>, these processes, though emerging later, are represented at three separate levels. On the one hand, nationalism is intensifying. The hatred towards the “other” constitutes a leading political platform of one of the two ruling Bulgarian parties – United Patriots. On the other hand, populism is finding gaps in the economic policy through statements on the fight against monopolies and a number of legal actions to curb business. From a third point of view, authoritarianism is manifested through the resolution of urgent issues not by the institutions, but by the individual will of the head of the executive power: the current Prime Minister Boyko Borisov. Re-

garding the phenomenon of “skipping” institutions, most visible are the attempts of the executive power to control the judicial and when it does not succeed, to cause difficulties in its established functional order.

### CONSTITUTIONAL PRINCIPLES VERSUS CLEAR RULES OF THE GAME

Simply put, legal order in ex-communist countries can be best explained by a person familiar with the structure and functioning of both democracy and socialism. Bulgarian scientist Nikola Dolapchiev's<sup>5</sup> understanding of *the legal order* includes both the legal framework and law enforcement. His definition of the totalitarian legal order is remarkably accurate: “like the mythological Janus,”<sup>6</sup> justice in these countries has two faces – one that is relatively decent and intended to be shown to the outside world, and another – the true one that can only be seen through careful study of the real facts.” The post-totalitarian legal order is highly ambiguous – it constantly mixes the shortcomings of socialism with democratic achievements. The Bulgarian Constitution as of July 1991 is the first democratically adopted constitution among all the countries of the former communist camp. It proclaims the separation of powers in a parliamentary republic; it “preaches” the protection of human rights and raises the principle of private property and free enterprise. As a tool for the protection of the constitutionally established order, the Republic of Bulgaria perceives the functioning of a Constitutional Court (which is outside the judicial power), to be the “guardian” of the supreme law and the established state order. To protect the

<sup>4</sup> In the *Human Freedom Index 2017*, Bulgaria ranks 41 out of 159 countries, with an overall score of 7.83 in ‘Human Freedom’ (receiving a higher score in terms of ‘Personal Freedom’: 8.26, and lower for ‘Economic Freedom’: 7.39). See Vásquez, I. and T. Porčnik (2017) *The Human Freedom Index 2017*. Washington, D.C.: Cato Institute, Fraser Institute, and Liberales Institut. Available [online]: <https://www.cato.org/hfi>

<sup>5</sup> Dolapchiev, N. (1953) “Law and Human Rights in Bulgaria,” [in:] *International Affairs*, Volume 29, No. 1, p. 59.

<sup>6</sup> In ancient Roman religion and myth, Janus is the god of beginnings, gates, transitions, time, duality and endings. Usually depicted as having two faces, Janus presided over the beginning and ending of conflict, and hence war and peace.



## THE STATE OF THE BULGARIAN JUDICIARY CAN BE DESCRIBED AS “A STORY OF POVERTY AND GLITTER”

rights and legitimate interests of the citizens, a system of courts is established, which includes the division of civil, criminal, and administrative law. Extraordinary courts are not allowed, and specialized courts are governed by law. The Prosecutor's Office is unified and centralized and preserves its status as totalitarian, wielding broad powers in all spheres of public life. The figure of the Prosecutor General was described by one of the authors of the first totalitarian Soviet constitution in 1947 as “an institution of a supreme, higher-ranking nature.”<sup>7</sup> The Chief Prosecutor stands “above the Minister of Justice, over the Council of Ministers.”<sup>8</sup>

Needless to say, the clear rules of the game are losing their clear content. The proclaimed democratic organization of society loses the opportunity to reflect the need for the development of society, including the refutation of the unresolved issues in the Bulgarian Constitution or

poorly settled issues regarding the exercise of citizens' rights. There are several reasons for this.

Firstly, because the concept of basic laws' dynamic nature as “living documents developing with society”<sup>9</sup> is proclaimed but not developed in the Bulgarian constitution. The ordinary National Assembly changes the laws, while the polity and state government remain unchanged. In the event of a major change, a Grand National Assembly should be constituted. However, the supreme law does not specify anywhere, nor procedurally secure the form of polity or state government.

Secondly, this legal deficit has built a defense line against the attempt to redefine the Bulgarian constitution's temple of values – the organization of the judiciary. The Constitutional Court of the country contributed to this, as in a number of decisions it proclaimed any change in the organization of the judiciary to be “essential”<sup>10</sup> and within the powers of the Grand National Assembly. Thus, the Constitutional Court acquired the character of a non-promulgated institution likened to an “additional legislature”, as it has been labeled by Chris Hanretty.<sup>11</sup>

According to the researcher, the main weaknesses of the judiciary are as follows:

- the prosecutor's office is overwhelming, but it is unaccountable and practically irresponsible for the pursued criminal policy;

<sup>9</sup> Opinion of the Commission of Democracy by Law 2015 of the Council of Europe on the Constitution of the Republic of Bulgaria, CDL-AD(2015)022.

<sup>10</sup> Resolution № 3/2003 of the Bulgarian Constitutional Court.

<sup>11</sup> Hanretty, Ch. (2014) , “The Bulgarian Constitutional Court as an Additional Legislative Chamber,” [in:] *East European Politics and Societies*, Volume 28, No. 3, pp. 540-558.

<sup>7</sup> See: Doncheva, L. (2012) “The Problem Concerning the Judiciary in the Process of of Elaborationand Adoption of the Constitution of the Republic of Bulgaria of 1947”, [in:] *Epochi*, Volume XX, No. 2, pp. 137-158.

<sup>8</sup> Ibid.



## THE BULGARIAN CONSTITUTION IS ALSO CONTRADICTORY IN DISTRIBUTING THE WEIGHT OF THE INDIVIDUAL RIGHTS OF ITS CITIZENS

- despite the declared independence of the judiciary, bearers of the judiciary (the judges) are not provided with levers to exercise and defend their independence even within the judicial system itself;
- judges are irreplaceable but only after 5 years of service;
- for the courts as custodians of citizens' interests, no detailed distinction has been made between extraordinary and specialized courts;
- the constitution encourages the raising of a magistrate's establishment, following the example of the Soviet Party Nomenclature – the administrative heads of the court and the prosecution are not limited by the number of mandates they can perform.<sup>12</sup>

<sup>12</sup> Independent analysis of the structural and functional model of the Prosecutor's Office of the Republic of Bulgaria, available in English on the web-site of Ministry of Justice of Republic of Bulgaria. Доклад прокуратура (EN). Available [online]: <http://www.mjs.bg/2156/>

The state of the Bulgarian judiciary can be described as "a story of poverty and glitter"<sup>13</sup> – following the title of a detailed study of the structure and practices of Bulgarian justice by Professor Bruno Schönfelder. The paradox of the Bulgarian judiciary's condition is its position as the most independent among the countries of the post-communist world. However, it has failed to successfully fulfill its plan and has fallen into crisis. The crisis becomes a manifestation of the unpredictability of justice, denial to use court, or finding alternative dispute resolution mechanisms that are on the verge of the law and often stimulate corrupt practices among magistrates and in the society as a whole. Alternative dispute resolution, most often using force methods, began in Bulgaria in the 1990s, and its use has not ceased to this day.

Initially, the independence of the judicial system has served as an obstacle to the new public order since 1989 to seek anti-communist homicide. That is, the initial strong independence actually served to preserve the status of former communist functionaries, not citizens.

Besides the problems listed above, the Bulgarian Constitution is also contradictory in distributing the weight of the individual rights of its citizens. Thus, the basic law proclaims and guarantees the inviolability of private property, but at the same time, it gives a handful of wide-ranging "social rights" – "provisions that are similar and even more outright than those of the constitutions of Poland and Hungary".<sup>14</sup> The strengthened "social model" does not produce the desired social outcome – social systems such as health care, pension, and

<sup>13</sup> Schönfelder, B. (2005) "Judicial Independence in Bulgaria: A Tale of Splendour and Misery," [in:] *Europe-Asia Studies*, Volume 57, No. 1, pp. 61-92.

<sup>14</sup> Ibid.



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social assistance are in a state that does not adhere to what is stated. Professor Schönfelder gives as an example of the constitutionally established right to “free health care,” which raises a barrier to efforts for meaningful reform.<sup>15</sup>

#### **GUARANTEES FOR THE REAL EXERCISE OF CITIZENS' RIGHTS: THE ROLE OF THE JUDICIARY**

There is not much to be destroyed in Bulgaria, as the achievement is not so significant—unlike the other countries of the former Socialist bloc. In principle, the independence of the court is guaranteed by the rule of law. It is the securing of this guarantee that has been a key recommendation to Bulgaria for a period of approxi-

mately 20 years, both from the Council of Europe and the European Union<sup>16</sup>. Following the principle of separation of powers, the modern democratic state adheres to the separation of power between legislative, executive, and judiciary. The executive power and the legislature in Bulgaria are essentially in a conflict-free relationship, as the majority in the National Assembly exercising the legislative power elects the executive.

By its nature, the judiciary is the state authority that protects against excessive state interference in citizens' lives in an attempt to over-regulate or subordinate them. In this sense, if the separation of powers is considered, it is inevitable that the judiciary is the opposition of the executive and the legislature, as well as of the politically formed power.

By repealing acts and decisions of the executive that drive concrete policies, the court is also a corrective for policies, which puts it, again, in a vulnerable position. Thus, the judiciary, responsible to the public to protect the interests of each and every citizen, remains self-defenseless in the face of the other two branches of power. It is precisely the refusal of the legislature and the executive to provide sufficient constitutional guarantees for the independence of the judiciary that casts doubt on the protection of the fundamental rights of the citizens.

The independence of a court is achieved by giving independence to an individual judge, who her/himself is the holder of the judiciary. That is to say, not the insti-

<sup>16</sup> See: Annual reports of the Cooperation and Verification Mechanism (CVM) for Bulgaria. Available [online]: [https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania\\_en](https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania_en)

<sup>15</sup> Ibid.



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tution of the court, but rather the judge exercising the function is important. The level of independence is achieved and measured by how the matters of appointment, appraisal, promotion, and punishment of the individual judge are dealt with. The standard adopted by the Council of Europe is that these matters should be dealt with by a body made up of a majority of judges directly elected by the judges.<sup>17</sup> Most often, this is the Supreme Judicial Council.

<sup>17</sup> Opinion of the Commission of Democracy by Law 2017 of the Council of Europe on the Judicial System Act, CDL-AD(2017)018. Available [online]: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)018-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)018-e)

As opposed to judicial independence, the other representative of the judiciary in Bulgaria is the Prosecutor's Office. It pursues state criminal policy and holds the function of investigating crimes, prosecuting, and maintaining the charges in court. Professional conduct is inherent to the Prosecutor's Office, and to each individual prosecutor within the boundaries of the limited autonomy to which the Prosecutor's Office is entitled. It is precisely the degree of independence that brings the great difference between judges and prosecutors. We speak of autonomy, as the judges are obliged to make a decision based on their inner conviction and the law without taking into account or defending state or any other interest. Unlike the judge, the prosecutor feels bound to defend the public interest by pursuing guilt and punishing specific individuals. This requires him to report to the public and the other authorities on the punitive policy pursued.

In the Bulgarian context, this distinction, affixed with explanations and recommendations by the Council of Europe, does not seem to be shared as a value and a landmark among much of the political class<sup>18</sup>. All efforts to reform the Bulgarian judiciary are marked by the two following features:

- refusal to give court independence, with the help of a government-led judicial council;
- refusal to seek accountability and responsibility of the Prosecutor General, retaining her/his status of the supreme figure amongst all magistrates in a Stalinist model.

In resolving a legal dispute regarding people's civil rights and obligations or the merits of any criminal charge against

<sup>18</sup> Ibid.



them, Article 6 of the European Convention on Human Rights (ECHR) guarantees the right of every person, to have a fair and public hearing of their case within a reasonable time by an independent and impartial tribunal established by law. Led by the desire for political control over the judiciary, the authorities in Bulgaria conduct policies that run counter to the principle of separation of powers and the rule of law. This puts at risk the protection of the fundamental rights and freedoms of Bulgarian citizens and foreigners staying within the territory of the country. In practice, there is no guarantee of the implementation of Article 6 of the ECHR, which is manifested in several ways for citizens and businesses.

#### 1. For the citizens that means:

- in civilian terms: difficulties in exercising property rights. Cases of disputes and possession are subject to dependence and the right to freedom of association, which is always to be defended before a court, can hardly be upheld in the handling of a lawsuit by a dependent judge;
- in criminal terms: a risk of non-revealing and non-punishment of the perpetrators of the fundamental rights of the person, such as life, dignity and civil rights;
- in administrative terms: difficult protection against unlawful regulatory acts of local and central government.

#### 2. For business:

- in civilian terms: difficulty in resolving commercial disputes and protecting the right of ownership of a commercial enterprise;
- in criminal law: a risk of difficult search for responsibility for abuse;

- in administrative law: difficulties in repealing irregular and unlawful regulatory acts, difficult defense in tax law infringement cases, as well as difficult or ineffective appeal procedures, public procurement, licenses and permits.

Judicial trials are also often deprived of the possibility of a predictable outcome of litigation.

Furthermore, the unreformed Prosecutor's Office is used to protect business interests close to power, to persecute businesspersons who are uncomfortable with power, and even to directly interfere in business affairs. The bankruptcy of one of the major banks in the country, Corporate Commercial Bank AD, helped by the Prosecutor's Office proceedings, despite the existence of a special regulator, is also indicative of this. Evidence of the over-interference of the Prosecutor's Office regarding economic relations is, for example, the conviction of the Republic of Bulgaria to the ECHR in the case of the Czech company Zlinsat against Bulgaria.<sup>19</sup> In this case, the ECHR concludes: "the minimum degree of legal protection to which individuals and legal entities are entitled under the rule of law in a democratic society was lacking. It follows that the interference with the applicant company's possessions was not lawful, within the meaning of Article 1 of Protocol No. 1."<sup>20</sup> Thus, the dependence within the judicial system itself

<sup>19</sup> Case of Zlinsat, spol. s r.o. versus Bulgaria (application no. 57785/00). Available [online]: [http://hrlibrary.umn.edu/research/bulgaria/Zlinsat\\_en.pdf](http://hrlibrary.umn.edu/research/bulgaria/Zlinsat_en.pdf)

<sup>20</sup> According to Protocol 1, Art. 1 of ECHR Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

by the Prosecutor General is multiplied as a dependence of business relations on the Prosecutor's Office.

### LEGISLATIVE INITIATIVES CONFIRM OR REJECT FUNDAMENTAL RIGHTS: RECENT EXAMPLES

A fundamental feature of modern democracies is respect for citizens' rights, taking into account the maximum pluralism in society. In order to achieve this state of society, the laws governing relations should be legitimate for all citizens.

A sign of the legitimacy of the laws is that they are fully recognized and respected by the people. The condition for a legitimate legislative policy is an open and equal public discussion of policies and laws taking into account all points of view and giving priority to the stronger argument. As an expression of this, the legislative process is accompanied by public discussion and impact assessment of the draft legal act. In Bulgaria, a special law regulates this – the Law on Legal Acts.<sup>21</sup>

However, in Bulgaria the understanding is that the law regulates the principles, but does not affect the practices. The current 44<sup>th</sup> National Assembly, in less than a year of mandate, established law-making chaos. The procedure for proposing drafts of legislation, discussion, and voting suffers from several significant defects:

1. When the executive does not wish to clearly state their policy, they use an unpopular deputy as a proposer.
2. When governors conceal their collusion with the opposition on topics to the detriment of justice and public interest,

proposers are deputies from the ruling party, and the opposition supports the law only when voting.

3. The deliberations of the bills in the committees of the National Assembly are carried out taking into account the views of politicians only, without taking into account the expert opinions of professional organizations, the academic community, and the non-governmental organizations.
4. The quality of the legislation is at a critically low level – basic procedural and structural laws change multiple times within a few months.
5. Legislation is unpredictable; there is no legal certainty.
6. Legislation is unclear – it is necessary to use the archaic method of authentic interpretation of the laws by the National Assembly because the judiciary does not find a way to apply them.

Failure to comply with the legislative process would not be a cause for serious concern if the laws ultimately did not obstruct the exercise of citizens' rights. In this way, the laws remain rather legitimate for their authors, but not for society.

### LAW-MAKING CAPACITY IN BULGARIA

The law-making capacity in Bulgaria is therefore problematic. To illustrate this phenomenon, let us take a look at several examples of how the process of introducing or amending laws currently looks like in the country from the perspective of an active Bulgarian pro-European politician.<sup>22</sup>

<sup>21</sup> Law on statutory instruments, Promulgated State Gazette No. 27, April 1973, last amended State Gazette No. 34, May 2016. Available [online]: <https://www.lex.bg/laws/ldoc/2127837184>

<sup>22</sup> At present, the Republic of Bulgaria is governed by a coalition between the pro-European GERB party and a group of nationalist parties known for its pro-totalitarian views. The governing parties, although claiming to be in a different political view, show common thinking in drafting and adopting restrictive laws. The examples are detailed in the text.



**Tide Turned Against**

**An Ideal Renewed**





### **RESTRICTION OF ECONOMIC AND OTHER RIGHTS AND FREEDOMS**

The populism of the government, masquerading as a socially responsible policy, was directly reflected in the recent amendment of the Commerce Act.<sup>23</sup> At the end of December 2017, an obligation was imposed on the seller of a commercial enterprise, a limited liability company, to prove that it had paid all its employees' salaries and insurance for a period of three years back from the date of the sale. If it is not able to pay its salaries and insurance contributions, the buyer can pay them for. Formally, nowhere in the law does it say that the sale of an enterprise with liabilities is forbidden. In practice, however, the public register of traders in the country refuses to record changes in the ownership of traders who have not provided evidence of the lack of liabilities.

Framing the image of politicians as "fighters with unfair employers," has been accompanied by serious administrative obstacles to prove this lack of liabilities. It turned out that there is no possibility of checking in the accounts of the National Revenue Agency whether a particular company has outstanding obligations to its employees and the state. It came to the acceptance of a declaration template, in which the seller of the company shall declare the presence or the absence of outstanding liabilities. Because of this "reform for the benefit of the people," for nearly three months it was actually impossible in Bulgaria to change the ownership of any company organized as LTD. This, in practice, limits the right to a free economic initiative, the right to property, and the right to association, which are enshrined in the Bulgarian constitution.

<sup>23</sup> Bulgarian Commercial Law, Promulgated State Gazette No. 48/18, June 1991, last amended State Gazette No. 15/16, February 2018. See: Art. 15, Art. 16, Art. 129. Available [online]: <https://lex.bg/laws/ldoc/-14917630>

### **CRIMINALIZATION OF THE FREEDOM OF CONTRACTING**

From antiquity to the present day, it is clear that to conclude a treaty, one must have the freedom to negotiate, and this freedom goes hand in hand with the responsibility of what has been agreed. Simply put, *pacta sunt servanda* (contracts must be observed). But who, if not a modern populist, can reverse the principles of the Roman law?

The National Assembly of the Republic of Bulgaria has submitted draft amendments to the Criminal Code aimed at combating corruption in the private sector at the end of December 2017. In general, corruption is a state inherent to public entities when they exercise power in that capacity and position, but the Bulgarian Ministry of Justice does not share this understanding. The ministry is proposing to extend the concept of an official by including traders and their employees.<sup>24</sup> Two dangerous consequences arise:

1. Anyone negotiating more favorable terms on a commercial contract between private entities will be prosecuted if, in the negotiation process, s/he "has taken or accepted a gift or any service."
2. Anyone who has breached or failed to perform his/her duties and thus harmed the employer's financial interest will be prosecuted and charged. This text may sound convincing if we do not realize that a single disciplinary violation will lead to prosecution.

The bill is motivated to protect the interests of business and society, but business is clearly opposed to accepting it, as evidenced by the views of nationally representative employers' organizations.

<sup>24</sup> Народно събрание на Република България (2017) Законопроект за изменение и допълнение на Наказателния кодекс. Available [online]: <http://www.parliament.bg/bg/bills/ID/77927/>

This legislative bias shows a return to the roots of the communist dictatorship – everything that is not explicitly permitted is forbidden. This is contrary to the principle of the modern rule of law, according to which, everything is allowed unless declared a crime by law.

### **EXTRAORDINARY COURTS IN NO TIME**

Since 2011, a special type of courts and units of the Prosecutor's Office called "specialized," have been operating in the Bulgarian justice system. Their primary aim was to examine cases in which high-level people were accused. According to Art. 411a<sup>25</sup> of the Bulgarian Criminal Procedure Code, the specialized criminal court deals with some cases of crimes committed by MPs, ministers, mayors, municipal councilors and other senior administrative officials. In addition, these specialized structures had to serve as a promise to tackle organized crime and corruption, at the same time demonstrating to the public that something is being done, and reporting to the European Commission how well the Bulgarian politicians fight against corruption<sup>26</sup>. Thus, a number of other special anti-corruption structures – a Commission for the Confiscation of Illegally Acquired Property, a Conflict of Interest Committee, among others – have "swarmed." The overall impression is for an abundance of authorities and laws with low law enforcement capacity and desperate performance – Bulgaria ranked 71st in

<sup>25</sup> Penal Procedure Code, Promulgated State Gazette No. 86/28 October 2005, last amended State Gazette No. 7/18, January 2018. Available [online]: <https://www.lex.bg/bg/laws/ldoc/2135512224>

<sup>26</sup> Penal Code, Promulgated State Gazette No. 26/2, April 1968, last amended State Gazette No. 101/19, December 2017. Available [online]: <https://www.lex.bg/laws/ldoc/1589654529>



## BULGARIA RANKED 71<sup>ST</sup> IN THE CORRUPTION PERCEPTIONS INDEX 2018 OF TRANSPARENCY INTERNATIONAL, LOWEST IN THE EUROPEAN UNION

the *Corruption Perceptions Index 2018* of Transparency International, lowest in the European Union.<sup>27</sup>

In the second half of 2017, a number of changes were made to extend the powers of the specialized courts and the specialized Prosecutor's Office.

First, amending the Law on the Judiciary government predicted a special order of higher salaries for judges and prosecutors of the specialized court and prosecution.<sup>28</sup> In simple terms, the new texts can be treated as payment by the political class to be more politely investigated and pros-

<sup>27</sup> Transparency International (2017) *Corruption Perceptions Index 2017*. Available [online]: [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2017#table](https://www.transparency.org/news/feature/corruption_perceptions_index_2017#table)

<sup>28</sup> Judiciary System Act, Promulgated State Gazette No. 64/7, August 2007, last amended State Gazette No. 15/16, February 2018. Available [online]: <https://www.lex.bg/laws/ldoc/2135560660>

ecuted. The Supreme Judicial Council, the Supreme Bar Council, and the Union of Judges in Bulgaria expressed their opinions against this legislative action. The Legal Committee of the National Assembly did not comment.

Secondly, in parallel with this, the Penal Procedure Code has been amended, and cases against the special category of persons (ministers, deputies, mayors, municipal councilors,) will be governed by the same procedural rules, except for jurisdiction and time limits. Proceedings against the government will be dealt with in a shorter time, and the relocation of only some of the cases against the governors to the Specialized Criminal Court, mixes the permissible criteria for defining special and particular competencies. As a result, the Specialized Criminal Court neither has jurisdiction over all cases against a certain type of person, nor is it a specific category of cases against any category of person.

Because of this change, Bulgaria now experiences unequal treatment of judges, prosecutors and investigators, unequal treatment of the defendants themselves and signs of an extraordinary criminal court explicitly prohibited by the Bulgarian Constitution. The Supreme Court of Cassation requested the Constitutional Court to repeal the text of the law for this legislative action. At this stage, the case is admitted.

### ***JUDGES HAVE NO RIGHT TO CONVICTION***

In 2015 and 2016, the Bulgarian Constitution<sup>29</sup> and the Judiciary Act were amended to make prosecutors unable to influence the professional and disciplinary

matters of judges. Thus, the toolbox for pressure on the court through the prosecution was limited.

In 2016, Bulgarian politicians were reforming. In 2017, they were re-reforming. Under this motto the judicature law was revised twice in the past year. One amendment allowed any judge to be removed from office if s/he was charged with a serious intentional crime without the right to appeal the removal. Apart from this, by removing the magistrate who has been charged as an accused with an intentional crime, the principle of the Roman law is undermined, namely that the accused is innocent until proved otherwise. Given the fact that the removal order cannot be appealed, the dismissed magistrate is deprived of the rights of defense. Although this is still a matter of law, written in Article 6 of the European Convention for the Protection of Human Rights, the deputies did not accept the abovementioned arguments. This made it possible for judges to be subject to prosecutors; if a prosecutor does not like a particular judge pronouncing a prosecution charge, the prosecutor has the right to charge the judge and remove the latter from a specific case.

Following an opinion by the Venice Commission and the International Judicial Association, a rapid revision of the law followed<sup>30</sup>. However, the revised version still does not meet the standard of preserving the judge's independence, taking into account her/his inner conviction of how to resolve a particular case.

<sup>29</sup> Constitution of the Republic of Bulgaria (1991). Available [online]: <https://www.lex.bg/laws/ldoc/521957377> (in Bulgarian)

<sup>30</sup> Българска съдийска асоциация (2017) РЕЗОЛЮЦИЯ НА ЕВРОПЕЙСКАТА АСОЦИАЦИЯ НА СЪДИИТЕ. Available [online]: <https://www.judgesbg.org/bg/библиотека/mezhdunarodni-aktove/item/1344-резолюция-на-европейската-асоциация-на-съдиите,-сантяго,-чили,-13-11-17r.html>

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#### INSTEAD OF A CONCLUSION

The countries of the former post-World War II communist camp have always had apparent signs of convergence. In the past, it has been the attempt to involve them as silent satellites of the USSR, and in their post-totalitarian life – to the legal and economic order of the Old World. At present, the actions of power in a number of countries in the former Eastern Bloc are aimed at abolishing the democratic functioning of the state, and hence the rights of citi-

zens in the name of values that they seek to make more important than human rights and freedom.

The structure and organization of the judiciary, coupled with the conceptually controversial and quality laws adopted in Bulgaria show that the rise of certain categories of fundamental rights at a constitutional level is not a sufficient guarantee for their exercise. Even if the state nominally recognizes certain rights, if good law and working authorities do not accompany this, they cannot really be exercised.

The role of the judiciary is of particular importance for the exercise of rights and the protection of the interests of citizens. If prosecutors do not investigate and accuse equally all criminal suspects, then the state is the protector of crime and aggressor against personal freedom. If the judges are not independent and free to decide cases of citizens, then any external force (another person or the state itself) is able to deprive them of their rights.

The same objective can be achieved by different means, but civil liberties and the rule of law can only be achieved through good legislation. Some of the recent legislative initiatives of power in Bulgaria have led to the hardening of the post-communist environment and the return to a state of society inherent to the previous form of socialism. ●



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